No. 109.

Brf. of Voorhees & Adrain for P. E.

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Filed Nov. 14, 1900.

Supreme Court of the United States.

AUGUST STREITWOLF.....*Plaintiff in Error,*

VERSUS

ELIZABETH STREITWOLF....*Defendant in Error.*

BRIEF FOR PLAINTIFF IN ERROR.

WILLARD P. VOORHEES,
ROBERT ADRAIN,
Counsel for Plaintiff in Error.

Supreme Court of the United States.

AUGUST STREITWOLF.....*Plaintiff in Error,*

VERSUS

ELIZABETH STREITWOLF....*Defendant in Error.*

Brief for Plaintiff in Error.

STATEMENT.

This is a Writ of Error to the Court of Errors and Appeals in the Last Resort in all Causes of the State of New Jersey. It runs to a judgment entered in that Court affirming the decree of the Chancellor entered in a cause in the Court of Chancery of New Jersey wherein the defendant in error was complainant and the plaintiff in error was defendant.

For brevity we will call the plaintiff in error "Mr. Streitwolf" and the defendant in error "Mrs. Streitwolf."

They were married on the third day of June, eighteen hundred and seventy-seven, and lived together as husband and wife in the city of New Brunswick, New Jersey, down to about the third day of August, eighteen hundred and ninety-six, when Mrs. Streitwolf left her husband, as she alleges in consequence of his abuse and ill-treatment (R. 1).

On the seventeenth day of August, eighteen hundred and ninety-six, Mrs. Streitwolf filed her original bill in the Court of Chancery of New Jersey for divorce from bed and board on the ground of cruelty. During their married life and up to the time of the separation, the parties had lived in a house in New Brunswick, which Mr. Streitwolf owned, the lower part of which was used for his store and the upper part was the living apartments. After the rupture between them and the departure of his wife, Mr. Streitwolf sold out his business and leased the real estate and building and furniture to the purchasers of the business and left the State of New Jersey and

abandoned his residence there and took up his residence in the city of New York (R. 25 and 102). He never resided in New Jersey after this time (R. 120); and continued to make his residence and remained domiciled in the State of New York until the sixth day of May, eighteen hundred and ninety-seven, when he left the State of New York and took up his residence and domicile at Mandan in the State of North Dakota (R. 104). He was temporarily absent in Egypt from January 1, 1897, to March, 1898, on account of ill health (R. 103). The fact of his change of domicile from New Jersey to New York in November, eighteen hundred and ninety-six, stands uncontroverted in the case.

During the period from May, eighteen hundred and ninety-seven, to November, eighteen hundred and ninety-eight, when Mr. Streitwolf came to the State of New Jersey for the purpose of attending the hearing in this case in the Court of Chancery, he was actually at Mandan in the State of North Dakota continuously, with the exception of certain short excursions which will be hereafter referred to. During the time of his residence in the State of North Dakota, he was in business there, participated in the caucus for the election of delegates to the Republican State Convention, in July, eighteen hundred and ninety-eight, at which it was a crime to vote, unless qualified by a previous residence for one year (R. 57). He was commissioned aide-de-camp on the Governor's staff May 17th, 1898 (Exhibit D. 3—R. 143).

Mr. Streitwolf also voted at the regular State election in November, eighteen hundred and ninety-eight, and paid taxes in 1897 and 1898 (R. 106).

Mr. Streitwolf was physically present in North Dakota during all this period except for about a week in June, 1897, when he visited the Yellowstone Park, purchasing at Mandan an excursion or return ticket, which included hotel accommodations, stage rides, etc., as well as railway fares, and entitled him to return to Mandan (R. 105).

In July of the same year he was notified of the death of an aunt in Germany who had left him a legacy, and he came to New York with the idea of going to Europe about the legacy.

stopping en route at Minneapolis to attend the convention of the Order of Elks, but gave up the idea of going to Europe and returned to Mandan about the second or third day of August.

On the twelfth day of September he left Mandan and went to Minneapolis for a few days, and made a trip through the Minnesota lakes, fishing (R. 106-107).

His intention was always to return to Mandan at once (R. 107).

On the ninth day of August, eighteen hundred and ninety-seven, Mr. Streitwolf commenced a suit for divorce in the District Court of the Sixth Judicial District of the State of North Dakota (R. 33). Mrs. Streitwolf was served with notice of this suit personally, in the city of Jersey City, New Jersey, on the seventeenth day of August, eighteen hundred and ninety-seven (R. 36). On the seventh day of September, eighteen hundred and ninety-seven, Mrs. Streitwolf filed a petition for injunction in the Court of Chancery of New Jersey and obtained a writ of injunction restraining him from prosecuting his suit for divorce in North Dakota, which, however, was never served upon Mr. Streitwolf, nor did it ever come to his knowledge. No appearance or answer was entered or filed by her in the North Dakota suit, and a decree was made therein on the seventh day of October, eighteen hundred and ninety-seven, absolutely divorcing Mr. Streitwolf from his wife and absolutely freeing him of and from all marital relations and all obligations arising therefrom, and the marriage theretofore existing between the parties was thereby dissolved, and the parties and each of them freed from the bonds of matrimony and all the rights, privileges and obligations thereof.

On the eleventh day of January, eighteen hundred and ninety-eight, Mrs. Streitwolf filed her bill supplementary to her original bill, in the Court of Chancery of the State of New Jersey against Mr. Streitwolf, therein alleging that Mr. Streitwolf had gone to North Dakota in execution of a scheme concocted for the purpose of obtaining an adjudication which could be used to defeat her suit for divorce, and praying that the judgment of the North Dakota Court might be declared void and of no effect and that Mr. Streitwolf be perpetually

enjoined from setting the same up in her suit for divorce in New Jersey (R. 141).

Mr. Streitwolf filed his answer to the supplemental bill in April, eighteen hundred and ninety-eight, denying all the allegations thereof and pleading the decree of the North Dakota Court, and also in said answer setting up that by the provision of Article IV, Section 1 of the Constitution of the United States, wherein it is provided that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, and that the Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof, the judgment in the State of North Dakota was entitled to such full faith and credit in the State of New Jersey, and was conclusive between the parties; and that under Section 905 of the Revised Statutes of the United States, providing that the records and judicial proceedings authenticated as in said act prescribed, shall have such faith and credit given them in every Court within the United States as they have by law or usage in the Courts of the State from which they are taken, the adjudication of the said North Dakota Court was final and conclusive between the parties and that the judgment or decree therein entered being final and conclusive in the State of North Dakota wherein it was rendered, was entitled to the same faith and credit in the Courts of the State of New Jersey; and that the North Dakota Court had in and by said judgment duly and fully ascertained the fact that Mr. Streitwolf was at the time of the institution of said suit, an actual resident, in good faith, of said State of North Dakota for the requisite period prescribed by the Statute of that State, and that such adjudication and determination of the North Dakota Court was final not only in the Courts of that State but in every other jurisdiction within the United States of America (R. 23 to 33), and prayed the same benefit of such defense as if he had demurred to the bill.

Mrs. Streitwolf did not bring on the hearing of her New Jersey suit until November 16th, 1898, when the case was opened before the Court of Chancery of New Jersey, and the hearing was then confined to the issue raised by the supple-

mental bill and supplemental answer, or in other words, to the validity of the North Dakota divorce (R. 72).

In that hearing, witnesses were produced on the part of Mrs. Streitwolf to show that the residence and domicile of Mr. Streitwolf in North Dakota was not *bona fide* and that Mrs. Streitwolf had always lived in the State of New Jersey.

At that hearing Mr. Streitwolf produced witnesses in opposition to the testimony given on the part of his wife, and also produced a duly exemplified copy of the record of the North Dakota suit, and the Statutes of North Dakota.

The Vice Chancellor thereupon rendered his opinion (R. 122), and subsequently, on the twenty-second day of November, eighteen hundred and ninety-eight, decreed "that the said "judgment or decree so as aforesaid entered in said cause in "the said District Court of the Sixth Judicial District in and "for the County of Morton, in the State of North Dakota, is "wholly void and of no effect. And it is further ordered, ad-"judged and decreed that said defendant August Streitwolf, "be and is hereby perpetually enjoined from setting up against "her or in any manner relying upon the said judgment or de-"cree in the suit now pending by the said Elizabeth Streitwolf "against him upon the original bill in this cause," etc. (R. 126).

From this decree an appeal was taken to the Court of Errors and Appeals in the Last Resort in all Causes in the State of New Jersey, and a decree of affirmance was entered in said Court of Appeals on the nineteenth day of June, eighteen hundred and ninety-nine (R. 147).

To this decree still remaining in said Court of Errors the writ of error in this case is directed, and the question in this case is whether the decree of that Court declaring void the judgment of the North Dakota divorce was a valid exercise of the power of the Court of Chancery of New Jersey or whether such decree was in violation of Article IV, Section 1 of the Constitution of the United States and of Section 905 of the Revised Statutes of the United States.

ERRORS ASSIGNED.

I.

That the said New Jersey Court of Errors and Appeals erred by affirming in and by said decree and remittitur the decree of the Court of Chancery made in said cause on or about the eighteenth day of November, 1898, whereby it was ordered, adjudged and decreed that the judgment or decree of divorce made and entered on the seventh day of October, in the year eighteen hundred and ninety-seven, in the District Court of the Sixth Judicial District of the State of North Dakota, in and for the County of Morton, in said State, in a cause wherein the said August Streitwolf was plaintiff and the said Elizabeth Streitwolf was defendant, is wholly void and of no effect.

II.

That the said New Jersey Court of Errors and Appeals erred by affirming in and by said decree and remittitur the decree of the Court of Chancery made in said cause on or about the eighteenth day of November, eighteen hundred and ninety-eight, whereby it was ordered, adjudged and decreed that the said August Streitwolf, the plaintiff in error herein, be perpetually enjoined from setting up against the said Elizabeth Streitwolf, the defendant in error herein, or in any manner relying upon a certain judgment or decree made and entered on the seventh day of October, in the year eighteen hundred and ninety-seven, in the District Court of the Sixth Judicial District of the State of North Dakota, in and for the County of Morton, in said State, in a cause wherein the said August Streitwolf was plaintiff and the said Elizabeth Streitwolf was defendant, or relying upon the said judgment or decree in said suit in the said Court of Chancery of New Jersey, or in any other suit or proceeding whatsoever at law or in equity.

III.

That the said decree and remittitur is erroneous in holding that it was within the power and authority of the Court of Chancery of the State of New Jersey to take jurisdiction of said cause, whereby the bill filed in said cause was for the purpose of attacking and cancelling the judicial proceedings of the District Court of the Sixth Judicial District of the State of North Dakota, in and for the County of Morton, wherein it appeared that said Court had jurisdiction of the subject-matter and of the parties to said cause of action, and that the judgment rendered in said Court was final and had never been appealed from by either party.

IV.

That the said Court of Errors and Appeals erred and the said decree and remittitur of said Court is erroneous because the plaintiff is thereby deprived of the benefits and protection of the constitutional guarantee contained in Article IV, Section 1 of the Constitution of the United States, which provides that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, and that the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof, and also of the benefit and protection of the laws and statutes of the United States enacted in virtue of said constitutional provision and guarantee.

V.

That the Court of Errors and Appeals erred and the said decree and remittitur of said Court is erroneous because the plaintiff in error is thereby deprived of the benefit and protection of Section 905 of the Revised Statutes of the United States, wherein it is provided that "the records and judicial proceedings of the courts of any State or Territory or of any

such country shall be proved or admitted in any other court within the United States by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate that the said attestation is in due form, and the said records and judicial proceedings so authenticated shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

VI.

That the said Court erred and the decree and remittitur thereof is erroneous for the reason that thereby it is held that the Court of Chancery of the State of New Jersey was invested and still is so invested with jurisdiction to attack and hold for naught the final judgment and decree of the District Court of the Sixth Judicial District of the State of North Dakota, in and for the County of Morton, in said State.

VII.

That said Court erred and the decree and remittitur thereof is erroneous for the reason that thereby it is held and determined that the District Court of the Sixth Judicial District, in and for Morton County, State of North Dakota, never acquired jurisdiction of the subject-matter or of the parties to said cause of action for divorce in which August Streitwolf, the plaintiff in error herein, was plaintiff, and Elizabeth Streitwolf, the defendant in error herein, was defendant, and that the said Court of Chancery of New Jersey had the power, jurisdiction, and authority to and did entertain jurisdiction, of a certain cause instituted in the said Court of Chancery of New Jersey by said Elizabeth Streitwolf, the defendant in error herein, against the said August Streitwolf, the plaintiff in error herein, for the purpose of obtaining a divorce *a mensa et thoro* from the said defendant in error herein, and for alimony after

the bonds of matrimony had been finally dissolved between them and an absolute divorce granted to said plaintiff in error by said Court in the State of North Dakota.

VIII.

The Court of Errors and Appeals erred and the decree and remittitur thereof is erroneous for the reason that thereby it is held to be within the power and jurisdiction of the Court of Chancery of the State of New Jersey and of said Court of Errors and Appeals to retry the questions of fact upon which the District Court of the Sixth Judicial District, in and for Morton County, State of North Dakota, tried and determined the said action for divorce between the plaintiff in error herein and the defendant in error herein, as aforesaid.

IX.

That said Court of Errors and Appeals erred and the decree and remittitur thereof is erroneous for the reason that the said action for divorce tried and determined by the District Court of the Sixth Judicial District, in and for Morton County, State of North Dakota, in which August Streitwolf, the plaintiff in error herein, was plaintiff, and Elizabeth Streitwolf, the defendant in error herein, was defendant, thereupon became final and conclusive between the said parties, and is and was *res adjudicata* prior to the bringing of said action in said Court of Chancery of the State of New Jersey.

X.

That said Court of Errors and Appeals erred and the decree and remittitur thereof is erroneous for the reason that thereby it is held and determined that the recitals and findings in the judgment and decree of said District Court of the Sixth Judicial District, in and for Morton County, State of North Da-

kota, were not conclusive, and, further, that said judgment and decree could be collaterally attacked and declared null and void by the Court of Chancery of the State of New Jersey and by said Court of Errors and Appeals.

XI.

That said Court erred in failing and refusing to file its written opinion in said cause, as required by law, setting forth the reasons for disregarding the rights and remedies of the plaintiff in error herein.

XII.

That the said Court of Errors and Appeals erred and the decree and remittitur thereof is erroneous for the reason that thereby the said Court did not give to the said judgment and decree of the said District Court of the Sixth Judicial District, in and for Morton County, State of North Dakota, such full faith and credit as the said judgment and decree had by law and usage in the courts of said State of North Dakota.

XIII.

That said Court of Errors and Appeals erred and said decree and remittitur is erroneous because therein and thereby sundry other errors of law are manifest and contrary to the Constitution of the United States and the law of the land.

ARGUMENT.

The faith and credit to which a judgment of one State is entitled in a Sister State.

"Full faith and credit shall be given in each State to the

public acts, records and judicial proceedings of every other State; and the Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof."—Article IV, Section 1 of the Constitution of U. S.

In Huntington v. Attrill, 146 U. S. 684, it is said:

"Congress in the exercise of its power so conferred, besides prescribing the manner in which the records and judicial proceedings of any State may be authenticated, has defined the effect thereof by enacting that 'the said records and judicial proceedings so authenticated shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken.'"

This puts the judgments of sister States upon a higher plane than that of comity. The effect is the same as that given by the courts of the State rendering the judgment.

Renaud v. Abbott, 116 U. S. 277, and
Hanley v. Donoghue, 116 U. S. 1.

Such judgments cannot be questioned *on their merits nor are they impeachable for fraud in obtaining them.*

In Wisconsin v. Pelican Insurance Co. 127 U. S. 265, it is said:

"These provisions establish a rule of evidence. They make the record of a judgment rendered, after due notice in one State, conclusive evidence in the Courts of another State of the matter adjudged. Judgments of one State . . . when proved in the Courts of another . . . State within the United States, differ from judgments recovered in a foreign country, in no other respects than in not being re-examinable on their merits nor impeachable for fraud in obtaining them, if rendered by a Court having jurisdiction of the cause and of the parties." Citing Hanley v. Donoghue, supra.

Christmas v. Russell, 5 Wall. 290.
Maxwell v. Stewart, 22 Wall. 77.

Such a judgment or decree cannot be questioned in collateral proceedings. If erroneous, it can only be avoided by an appeal.

Union Trust Co. v. Southern Inland Nav. & Imp. Co. 130 U. S. 565.

The jurisdiction of the Court can be inquired into.

It is useless to burden the Court with a long train of authorities holding to this doctrine in general terms.

This line of cases may be said generally to show an inquiry into the jurisdiction of the Court as to the subject matter or as to the *notice to the defendant.*

The inquiry in them is not directed to a consideration of those facts which necessarily the Court must decide for itself in order to determine the jurisdiction.

It must be also conceded that the doctrine is clearly established that jurisdiction having once attached the judgment cannot be avoided by showing that it was obtained by fraud.

Christmas v. Russell, 5 Wall. 290, is the leading case.

In Cole v. Cunningham, 133 U. S. 102, a rule inconsistent with this doctrine was stated and yet the Court in that case relies upon Hanley v. Donoghue, 116 U. S. 1.

Bayley in his work on Jurisdiction, Section 202, says that Cole-Cunningham is inconsistent and not in accord with the line of decisions of this Court.

Decrees of Divorce are within the Constitutional Provision and the Federal Statute.

Barbour v. Barbour, 21 Howard, 583.

In Cheever v. Wilson, 9 Wall. 123, the Court, speaking of the validity of a decree for divorce, said: "The Constitution and laws of the United States give the decree the same effect elsewhere which it had in Indiana. If a judgment is conclusive in a State where it is rendered, it

is equally conclusive everywhere in the Courts of the United States."

Laing v. Rigney, 160 U. S. 532, was a case decreeing divorce by the Court of Chancery of New Jersey. The New York Courts refused to give the decree for alimony any effect and the judgment was reversed in this Court distinctly upon the ground that effect had not been given to the provision of the Federal Constitution concerning full faith and credit.

A suit for divorce is in rem.

This Court has always held that marriage, while being a civil contract, in its inception, results in a relation and a status. This Court said in Cheever v. Wilson, 9 Wall. 123:

"The proceedings for a divorce may be instituted where the wife has her domicile; the place of marriage, of the offense, and of the domicile of the husband are of no consequence."

And so in Pennoyer v. Neff, 95 U. S. 734, the Court stated:

"To prevent any misapplication of the views expressed in this opinion, it is proper to observe that we do not mean to assert, by anything we have said, that a State may not authorize proceedings to determine the status of one of its citizens towards a non-resident, which would be binding within the State, though made without service of process or personal notice to the non-resident. The jurisdiction which every State possesses to determine the civil status and capacities of all its inhabitants involves authority to prescribe the conditions on which proceedings affecting them may be commenced and carried on within its territory. The State, for example, has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved. One of the parties guilty of acts for which by the law of the State a dissolution may be granted may have removed to a State where no dissolution is permitted. The complaining party would therefore fail if a divorce were sought in the State of the defendant; and if application could not be made to the tribunal of the complainant's domicile in such case, and pro-

ceedings be there instituted without personal service of process or personal notice to the offending party, the injured citizen would be without redress. Bishop on Marriage and Divorce, Section 156."

And so in Cheeley v. Clayton, 110 U. S. 701.

Maynard v. Hill, 125 U. S. 191.
Hilton v. Guyot, 159 U. S. 113.

The reasoning in these cases is not at all applicable to actions *in personam.*

Service of Process.

In divorce cases a constructive service out of the jurisdiction of the Court, is equally effectual as actual service of process.

In 2nd Bishop on M. & D. Sec. 152, it is said:

"The present clear American doctrines made conclusive by decisions of the Court of ultimate resort, accepts ex parte divorces pronounced by the Court of the applicant's domicile in full compliance with the local law, after its constructive notice to the absent defendant as adequate everywhere to dissolve or otherwise ascertain the marriage status."

And so in 2nd Freeman on Judgments, 585.
1st Greenleaf on Evidence, Section 525.
2nd Black on Judgments, Section 925, et seq.

Such is the law of the State of New Jersey. In Felt v. Felt, N. J. Chancery, 12 Dick. 101, affirmed on appeal, 45 Atl. Rep. 105, it is said:

"It appears sufficiently for present purposes that the complainant herein has always lived in New Jersey. A very learned and elaborate argument was made in her behalf to support the position that a decree of divorce could not be rendered against her in another State, which would

be valid and binding in this State, without actual service of process upon her in that State, or her voluntary appearance therein. The ground of this position was that another State could not obtain jurisdiction of her person, for the purpose of a suit for divorce, by pub'ication or service upon her out of that jurisdiction, and hence the decree was a nullity in this State. I am unable to adopt that view. I think it not only fairly covered by authority in this State, but that it had no foundation in reason. Chancellor Zabriskie, in Coddington v. Coddington, 20 N. J. Eq. 264, held that proceedings with regard to the validity or dissolution of marriage are proceedings in rem and actually operate upon the matter, and that the power of the court to deal with the marriage relation depends upon the fact of the domicile of one or both of the parties being within its territorial limits, and that, to enable the court to obtain jurisdiction, one at least of the parties must be domiciled within the jurisdiction. Such domicile gave jurisdiction to proceed and determine the status of the parties. In this case it is an admitted fact that the defendant herein was domiciled in the Territory of Utah for one year before, and at the time the suit was commenced by him and the decree rendered against the wife. The power of the court of that Territory to determine his status as to marriage was complete, and its action must be respected by us, provided it has been based upon grounds recognized as sufficient by civilized peoples, and reasonable notice and opportunity to appear and be heard has been given to the other party interested. The mere residence of the wife in another State can not affect the jurisdiction in that behalf of the court in which the husband is domiciled. To hold otherwise, as has been done by the courts of New York, in the cases cited by counsel, is, in effect, to deny relief to an injured spouse, provided the guilty party is able to escape beyond the jurisdiction of the court before service of process upon him or her. This vexed question, in all its aspects, has been the subject of much diversity of judicial judgment in the various States of the Union; but I think it may now be considered as settled by the great weight of authority in conformity with the view just expressed."

Due constructive service was made in this case.

The record shows that on the ninth day of August, eighteen hundred and ninety-seven, a summons was issued out of the

North Dakota Court addressed to the defendant Mrs. Streitwolf. It shows the return of the Sheriff of Morton County, North Dakota, dated August 10th, 1897, certifying that he received the summons and complaint on the ninth day of August, eighteen hundred and ninety-seven; that he had made due and diligent search for the defendant and was unable to find the defendant within his county; that on the tenth day of August, the plaintiff made affidavit that the summons and complaint in the action, duly verified, were filed with the Clerk on the tenth day of August. That the action was brought by the plaintiff against the defendant for an absolute divorce; that the defendant did not reside in North Dakota nor had she been within the State since the commencement of the action and that he knew that she was a resident of the State of New Jersey and that personal service could not be made upon her for the reasons before stated; and that the summons and complaint had been placed in the hands of the sheriff of the county with directions to serve the same; and setting forth the return of the sheriff and that the plaintiff had stated the facts to his attorney and that the defendant was a necessary and proper party to the proceedings. And also sets out the affidavit of Charles A. Oliver, showing personal service on the seventeenth day of August, eighteen hundred and ninety-seven, of the summons and complaint upon Mrs. Streitwolf in the city of Jersey City.

Afterwards the record recites as follows:

This cause coming on to be heard before the Court this 7th day of October, 1897, and it having been made to appear to the satisfaction of the Court from the records and files herein that the original complaint in this action, duly verified, was filed with the clerk of this Court on the 10th day of August, 1897, and that the affidavit of the plaintiff setting forth among other things that the defendant is a non-resident of this State and that personal service of the summons and complaint in this action cannot be made, was filed with the Clerk of this Court on the 10th day of August, 1897, and that the summons in said action together with the Sheriff's return endorsed thereon to the effect that after due and diligent search and inquiry the defendant could not be found in this State was

filed with the Clerk of this Court on the 10th day of August, 1897, and that thereafter said summons and complaint were personally served on the plaintiff out of the State, as required by the laws of this State, and that the defendant has failed to answer the plaintiff's complaint or demur thereto, or in any manner to enter an appearance therein, within the time required by the laws of this State.

And again in the judgment of the Court the same recitals are made and conclude in these words, "and that thereafter said summons and complaint were personally served on the defendant out of the State as required by law."

The Court of Dakota followed the law of that State as contained in the Revised Code of North Dakota, 1895, with reference to substituted service, such statutes being offered before the Court of Chancery of New Jersey in behalf of Mr. Streitwolf. A copy of the Statutes of North Dakota on the subject of substituted service is appended to this brief.

It is said in Galpin v. Page, 18 Wall. 350, that in proceedings under special statutory authority, where such proceedings are not according to the course of the common law or where general powers of the Courts are exercised over a class not within its ordinary jurisdiction upon the performance of prescribed conditions, the presumption of jurisdiction upon the performance of prescribed conditions will not attend the judgment of the Court, but the facts essential to the exercise of the special jurisdiction *must appear in such cases upon the record.*

In this case the facts do appear upon the record.

No question was raised as to the Statute of North Dakota concerning substituted service not being pleaded, nor was objection made on that ground when the Revised Statutes of North Dakota were offered in evidence in the Court of Chancery (R. 98).

In Woodward v. Bullock, 12 C. E. Green, 507, the Court of Errors and Appeals of New Jersey says:

> "But there is a point that was not in the brief of the counsel who argued the case before the Chancellor, nor presented for his consideration, which so seriously affects

the parties interested in this sale, that it demands the careful scrutiny of this court. This point was not purposely withheld, otherwise it would be instantly rejected; but it was overlooked until suggested here during the argument.

"It is sometimes said that this court, on appeal, will not permit parties to raise objections which they did not present to the court below, not only in justice to that court, but also to prevent surprise and abuse by reserving points expressly for further litigation. These results should always be guarded. But where the entire proceedings are before the appellate court for review, there can be no reason, where there is no intentional omission, and the parties have acted in good faith, why the whole case should not be examined and determined on appeal. It would cause needless delay and expense to send the cause back to the Chancellor for re-hearing upon the same pleadings and facts, when the result might be that the cause would be returned here for the further consideration of this court.

"In Beekman v. Frost, 18 Johns. 544-559, the reasoning on this subject is clearly stated. See also Murray v. Costar, 20 Johns. 604. Where a cause has been defended below, and comes up for review, and a point is made here which could not be obviated in the court below, by proof or amendment, this court ought not to refuse cognizance of such point."

The point was first made in the Court of Errors and Appeals. The Vice Chancellor was not confronted with it. Nor did he consider it. In his opinion (R. 125) he states:

"It is a serious question whether a service out of the jurisdiction can ever be the ground of a decree of divorce; and the only ground upon which it can safely be put is that of necessity, viz., that the party cannot get his rights without such service. That is the ground upon which I put it in the Felt case. But according to the Magowan case, as decided by the Court of Errors and Appeals, as I understand it, if the complainant in this cause, Mrs. Streitwolf, had appeared to the Dakota suit, it would not have prevented her from setting up here that there had been fraud practiced upon the Court in the matter of domicile."

If it had been made in the Court of Chancery, amendment would have been allowed instantly. No concealment of such a point would have been tolerated by the Appellate Court. The

Appellate Court would not consider it.

It is not necessary, however, to plead a statute of a foreign State to uphold the record of a foreign court when such record is exemplified under the Federal statute and sets out the steps taken to effect the substituted service, and concludes that such steps are "as required by the laws of this State" or "as required by law."

In a cause arising under this clause of the Constitution, the domestic tribunal will take judicial notice of the local laws of the State from which the record comes because their proceedings are subject to review in this Court, and since here the States are not regarded as foreign and their individual laws are officially noticed.

Ohio v. Hinchman, 27 Pennsylvania State, 479 (3 Casey).
Paine v. Insurance Co. 11 R. I. 411.
Rae v. Hulbert, 17 Ill. 572.
Carpenter v. Dexter, 8 Wall. 513.
Black on Judgments, Section 860.

The supplemental bill attacked the validity of the Dakota decree, and it was incumbent upon the person denying the jurisdiction to assert such denial by certain and positive averments and to negative every fact from which the jurisdiction might arise.

The supplemental bill admits the personal service upon Mrs. Streitwolf, but simply avers that the Court had no jurisdiction. This was not sufficient.

Black on Judgments, Section 902.

A plea negativing one means of notice, leaving others open, is insufficient (2 Am. Lead. Cases, 656). And so as to the allegations of a bill in equity.

Residence and domicile of the plaintiff in a divorce case is not a jurisdictional question.

A decree of divorce of one State when attempted to be used in another State may be attacked for lack of jurisdiction in the same way as a decree in any other case, but *residence* is no more a jurisdictional question than *marriage*. There is a distinction between the finding of a fact necessary to give jurisdiction and a decision that the Court has jurisdiction as a matter of law. Thus in Wanzer v. Howland, 10 Wis. 8, it is said:

> "If a court decides that it has power to try a cause and render judgment, which by law it has not, such decision does not give it the power. Its judgment may be questioned anywhere for want of jurisdiction; but if a tribunal is authorized to act upon a certain state of facts and also to try whether the facts exist, then if they are properly alleged before it and the parties are legally notified and have opportunity to contest them, the finding of such tribunal upon those facts would be the finding of a competent tribunal and ought to be conclusive until reversed in a direct proceeding.
>
> "I think there is a clear distinction between the finding of such facts and the decision of a court that as matter of law it has jurisdiction where it has none, because in the one case it has authority to try the facts and in the other it has no authority at all, although it decides that it has; and although the authorities upon this subject are full of uncertainty, this distinction is recognized and seems to me to rest upon solid reasons. It is recognized in Brodhead v. McConnell, 3 Barb. 187, and in Betts v. Bayley, 12 Pick. 582; and also in Brittain v. Kinnard, 1 Brod. and Bing. 432, which is the leading case upon the subject.
>
> "In that case the magistrate had jurisdiction to seize gun-powder in any boat on the River Thames. Under that authority he seized and condemned a vessel with masts which was admitted not to be a boat within the act. He was sued in trespass, but the court held his finding, that it was a boat, conclusive; and this case establishes what I believe to be the true rule, that although such facts have been treated as jurisdictional, yet that strictly speaking, they are not so, because, while conceding that the vessel seized was not a boat within the act, they yet hold that the magistrate had jurisdiction because he had power to decide

whether it was a boat or not, as a part of the offense charged that this power constituted the jurisdiction and not the actual fact.

"All suits and judicial proceedings are instituted to try questions of fact, and when they are instituted with proper allegations before a tribunal authorized to try them, it is not sound logic to say that the jurisdiction of this tribunal depends upon the actual existence of the facts alleged, and the neglect of this distinction growing out of the great strictness with which the proceedings of inferior tribunals have been regarded, has, I think, given rise to much confusion and inaccuracy and has lead courts in many instances to hold facts jurisdictional which were not so.

"The true rule would seem to be, in all cases, that where the allegations are so made that the tribunal has authority to proceed and try them and to render judgment according to its finding, it has then jurisdiction of the subject matter. I have thus alluded to what I consider to be the true rule in respect to such so called jurisdictional facts for the purpose of showing that even if the existence of the judgment here had been such a fact, it was still competent for the court below to have tried and determined it conclusively unless directly reversed, and that therefore, it was triable by the same rules that govern the trial of all other questions."

And so where the jurisdiction of a Court depends upon a fact which it is required to ascertain and determine by its decision, its finding of that fact showing it has jurisdiction is conclusive on collateral attack.

Works Courts and their Jurisdiction, page 127.
Wells on Jurisdiction, Section 61.
Freeman on Judgments, Section 522.

This is placed upon the ground that the action of the Court in ascertaining and deciding the fact necessary to give it jurisdiction is itself an exercise of jurisdiction, and therefore, its decision upon this point, like any other, *is conclusive against a collateral attack.*

In the case of Joseph W. Plume v. Howard Savings Institution, in New Jersey Supreme Court, 17 Vroom, 211, was a suit by an administrator, and the question was whether it could

be shown as a defense to this suit that the letters of administration were invalid because the intestate was not in fact dead. The late Chief Justice Beasley, delivering the opinion of the Court, says:

> "Looking at the foregoing statement of facts, it is manifest that the Orphans' Court, on the occasion in question, had jurisdiction of the subject involved in the application for authority to administer the estate of Philip McMahon as that of a deceased intestate. Such matter was as actually before that tribunal for its adjudication as it was possible for it to be. We might perhaps have doubt whether the court deduced the correct conclusion from the testimony before it as to the fact of the death of the alleged decedent, or as to its right to grant administration, under the conditions of the case, to the plaintiff, but it seems illogical to deny the *power* of the court to take cognizance of the affair and to proceed to judgment. In the case of Grove v. Van Duyne. 15 Vroom, 654, the test of jurisdiction, so far as relates to courts having a general cognizance over a class of cases, was declared by the Court of Errors to be the colorable presentation before it of the facts necessary to constitute the case a member of such class. In the present case there was plainly some proof of the death of the supposed intestate, and likewise of the fact that he was not, at the time of his decease, a resident of this State, and therefore, even if the court fell into error, which I do not intend to indicate, such error might have led, in a proper course of law, to a reversal of the judgment, but it can have no bearing against the right of the court to adjudicate upon the facts before it. Upon this assumption, that this power of judicature existed, it is apparent that the defendant in this instance must stand on the proposition that he has a right to show that the Orphans' Court decided incorrectly with respect to the *evidence relating to jurisdictional facts.* But such a contention is opposed to fundamental rules of law. If its correctness were admitted, it would at once degrade the judgments of the higher courts of the State to the subordinate rank of official procedures of a special character by statutory authority. For example, on such a theory a judgment of this court might be overthrown when put to the touch in a collateral proceeding, on the ground that the court erred in deciding on the facts before it that the defendant in the suit had been summoned, when in point of fact he had not received any notice of the action."

Chief Justice Green of New Jersey, in Perrine v. Farr, 2 Zab. 356, defines jurisdiction simply as "power," and this Court in the United States v. Arredondo, 6 Peters, 691, has defined it to be "the power to hear and determine."

Jurisdiction does not depend upon *ascertained* facts or the *actual existence* of matters and things, but it does depend upon the *allegations* made concerning things. If a certain state of facts is alleged to be true and an action be instituted for relief concerning them, in a tribunal which has the power to grant the relief prayed for, if the facts be true, that gives to that tribunal complete jurisdiction over such action. The allegations may not be true, the facts may have no actual existence, yet that does not oust the tribunal of its jurisdiction. A wrong determination of the existence of the facts by the court is error, but that can be re-examined only on appeal.

Jurisdiction depends upon the allegations and not upon the facts. The truth of the allegations does not constitute jurisdiction.

See Cook v. Bangs, 31 Fed. Rep. 640, where Mr. Justice Brewer delivered the opinion.

See also Van Vleet's Collateral Ataack, Section 60, page 73, *et seq.*

In Smith's Leading Cases, Vol. 1, Part 2, Sixth American Edition, page 1001, it is said:

> "The doctrine thus held, that the adjudication of a superior court upon a question within the general scope of its powers, is conclusive with regard to all the special facts necessary to render the exercise of those powers legitimate, is not only consistent with all legal analogy, but essentially necessary to the proper administration of justice. It has, indeed, been said, that since jurisdiction is necessary to give the right to adjudicate, the adjudication cannot be used as proof of the jurisdiction, without reasoning in a circle. But this argument hardly makes up in logic for what it wants in practical wisdom, and is open to the objection of assuming the point in dispute, as one of the premises on which to found the conclusion. When a complaint or allegation is laid before a judge or magistrate, which it is his duty to hear and investigate, he must necessarily proceed to determine whether it is sustained by the

facts, and having once obtained jurisdiction for this purpose, his decision must have the quality of every judicial decision, and be final. Although the authority of courts of justice is essentially a limited and delegated authority, it carries with it the right to determine when and where it shall be exercised, and whether the facts of each particular case are such as to admit of its exercise. If the case be necessarily and essentially beyond the authority of the tribunal which attempts to decide it, the defect will appear either on the face of the decision, or as soon as an attempt is made to carry it into execution, and the whole proceeding be manifestly and essentially void. But when the case is prima facie within the jurisdiction of the court, the judgment will be as conclusive upon the question of jurisdiction as upon any other question in the cause. One of the attributes of the judgments of superior courts is to suffice for their own support, and be in themselves proof that the powers of the court have been properly exercised." Citing cases.

Therefore when Mr. Streitwolf entered his action in North Dakota, alleging his residence therein in his complaint, the Court there having the general jurisdiction over the subject matter of divorce, that Court then became possessed of the jurisdiction or power to proceed and try the case and had the power to act upon and determine and adjudge whether the particular facts stated in such complaint were true or false and to grant relief accordingly.

The jurisdiction of the Court over the subject matter of divorce cannot be denied, nor that it was a Court of general jurisdiction. The record so proved it. The cases in this Court in which jurisdiction of the courts of sister States has been inquired into, have, in the main, and I may say with but a single exception, been confined to the question of the acquiring of jurisdiction over the defendant.

In no case, except that of Thompson v. Whitman, 18 Wall. 457, have the findings of the Court been overhauled.

In this case the Court permitted the recitals of a special statutory tribunal composed of two Justices of the Peace in the State of New Jersey to be overcome by evidence in the Court of a sister State.

In reading this case we are to distinguish between the effect

of the recitals contained in the record of a court of limited jurisdiction and the findings of fact set out in the record of a court of superior or general jurisdiction.

In Wyatt's Administrator v. Rainbo, 29 Alabama, 510, it is said:

> "If a court of limited jurisdiction is charged with the ascertainment of jurisdictional facts and its proceedings show that these facts were ascertained, they cannot be denied because the making of the jurisdiction of the court depends upon a preliminary fact, implies authority to ascertain that fact. A misapprehension of this principle doubtless led the court in Wyatt's Administrator v. Stelle into a position that the exercise of a jurisdiction dependent upon a preliminary fact, implies the ascertainment by the court of that fact."

In the case under consideration, however, we have the record of a Court of general jurisdiction in which specific findings of fact are set out (R. 49), as follows:

> "The plaintiff now is and for more than ninety days prior to the commencement of this action has been, in good faith, a resident of the State of North Dakota."

And again in the decree (R. 51), as follows:

> "And the cause having been submitted to the Court for decision and the court having given due consideration to all the matters and evidence brought before it in relation to said cause, did make and file its findings of fact and conclusions of law herein, wherein and whereby it was found and determined . . . that the plaintiff has been a resident in good faith of this State for such a time as to entitlee him to bring, and is now entitled to maintain this action, etc."

This then is a finding of fact in the cause which might have been controverted by the defendant and which she had an opportunity to controvert.

In the Peoples v. McCaffrey, 75 Michigan, 115, the husband filed a bill for divorce in Michigan and made an affidavit that

he had been a resident for a time named; he was then prosecuted for perjury in swearing to his residence. In this prosecution, he claimed that the divorce Court had no jurisdiction because he did not in fact reside in that State and the affidavit was therefore not perjury, but it was held that the Court did have jurisdiction, and he was convicted.

To the same effect is Kinnier v. Kinnier, 45 N. Y. 535, in which an attempt was made to attack an Illinois decree in the State of New York because the plaintiff was not actually a *bona fide* resident of that State. The Court said:

> "It is conceded he was there, appeared in that court and filed his bill and took the decree. The question whether he was a resident then so as to enable him to file his bill was for the court to determine, and although it may have decided erroneously, the decision cannot affect the validity of the judgment. The status of all persons within a State is exclusively for that State to determine for itself . . . . Sufficient facts are alleged to give the Illinois court power to decide the question of domicile, and the judgment is not void, if we concede that the decision was erroneous and if it is also conceded that the question of residence is vital to give jurisdiction. A wrong decision does not impair the power to decide or the validity of the decision when questioned collaterally."

And so do the Courts of the State of New Jersey hold, with the exception that such a decree could be impeached if procured by fraud, of which point we will speak later on.

In McGowan v. McGowan (Court of Errors and Appeals), 12 Dick. Chancery 322, it was held:

> "Where the plaintiff in a suit for divorce is required by statute to have been a bona fide resident of the State in which his suit is brought for a fixed period of time, in order to enable him to maintain his suit, the ascertainment by the court of the fact of such residence necessarily precedes a consideration of the merits of the case, and the determination of that question by the court is final not only in the courts of that State but in every other jurisdiction where the validity of the judgment comes in question, unless such determination has been procured by fraud. When however, the adjudication has been procured by fraud it

is without extraterritorial effect, and the judgment will be treated as void in the courts of a sister State."

In Van Vleet on Collateral Attack, page 377, Sec. 389, commenting on Thompson v. Whitman, 18 Wall. 457, it is said:

"The general principle established by this case is, that a record from another State when offered in evidence may be contradicted on any jurisdictional question of fact, and the specific question decided was, that it might be contradicted in respect to the place where the property sequestrated by it was seized. This case overturns the law as it then stood, and, in my opinion, is untenable on principle. That court, more than half a century before, had decided the specific question the other way. Thus, where a vessel had been condemned by a French prize court at Guadaloupe, it was contended in a federal court that the condemnation was void because the vessel was taken on the high seas and not within the jurisdiction of France; but the Supreme Court of the United States said: 'Although it be now stated, as a reason why we should examine whether a jurisdiction was rightfully exercised over The Sea Flower, that she was captured more than two leagues at sea, who can say that this very allegation, if it had been essential, may not have been urged before the French court, and the fact decided in the negative? And, if so, why should not its decision be as conclusive on this as on any other point? The judge must have had a right to dispose of every question which was made on behalf of the owner of the property, whether it related to his own jurisdiction, or arose out of the law of nations, or out of the French decrees, or in any other way.'

"The general principle involved was decided the other way in 1861. The French and Dutch were at war, which gave French prize courts the power to condemn Dutch ships; and where a French prize court condemned and sold a ship as Dutch, and the purchaser took her to England, where the former owner sued him in trover on the ground that she was an English ship over which the French court had no jurisdiction, it was held to be incompetent for him to contradict the French record on that question of fact. This case was followed in an early case in the Supreme Court of the United States, where it was decided that the record of a foreign prize court could not be contradicted by showing that the vessel did not, in fact, attempt a breach of blockade. If it be said that these were decisions of prize

courts, I answer, so was the New Jersey case; and I ask, why put the judgment of a prize court on a different foundation from that of any other court? The judge of that court is sworn to hear the evidence, and from that to find the facts, and then to apply the law, and that is precisely what all judges of all courts are sworn to do. The duty being the same, unless we are to disregard principle, the final judgments must be accorded the same force. But suppose the owner of the vessel in the New Jersey case had appeared and contested the question as to the place where it was seized being in Monmouth County, and had been defeated; and suppose he had then carried it to the Court of Common Pleas and there been defeated again; and then to the Supreme Court, and then to the Court of Errors and Appeals, and had been defeated on the merits in all the courts of New Jersey, would that have barred his rights to retry the same question in New York? To hold that it would, would demonstrate that the Supreme Court confounded the doctrines of *res judicatta* and collateral attack . . . because he had the opportunity to make that contest in the New Jersey courts. The principle involved here is not the same as that involved in the contradiction of service. . . . If a case ever comes before the Supreme Court of the United States, for instance, where a person who has been convicted and imprisoned for crime sues the sheriff in another State for false imprisonment, and offers to show that he committed the crime in a county other than that in which he was tried, the court will have to hold his evidence competent, and thus give him two days in court on that question, or overrule Thompson v. Whitman, because in that case the owner of the vessel first had his day in court in New Jersey, and then again in New York."

Thompson v. Whitman has in effect been disregarded if not overruled by this Court.

In re Cooper, 143 U. S. 472.

The question was whether a seizure had been made within the jurisdiction of the Court.

And the opinion says: "Upon the face of the libel and findings if the jurisdiction did not extend beyond three miles from shore, the legal inference is that the offense and seizure was within that limit . . ." The Court had power to inquire into the fact upon which jurisdiction depended, and its maintenance of jurisdiction involved the conclusion necessary to sustain it.

If therefore the findings of fact are properly part of the face of the proceedings the want of jurisdiction not only does not appear, but the contrary."

Erwin v. Lowry, 7 How. 172, is similar in effect.

Says Van Vleet, Col. Attack, Section 17:

> "Much confusion has resulted by applying the doctrine of *res judicata* to cases of collateral attack. . . .The doctrine of collateral attack denies any validity whatever to the former adjudication, while that of *res judicata* admits its entire validity and simply denies the scope claimed for it. There is little similarity between the two doctrines Collateral attack involves the jurisdiction of the court, and denies its power to act at all, while *res judicata* merely involves the question concerning what was actually contested and decided on the trial. The doctrine of collateral attack has nothing to do with the issues or the matters contested on the trial."

The present case is one of collateral attack. The fact of domicile was found by the Court *after jurisdiction to hear and determine it had attached by the allegations of the complaint.*

The fact of domicile was therefore not jurisdictional, but a mere fact put in issue by the pleadings, to be decided as any other fact.

As the existence or non-existence of this fact was determined by the Court, so the Court would be bound in its rendition of judgment.

The Court duly decided in this case the domicile of the defendant to be in North Dakota.

Residence in the statutes of that State means domicile as construed by the Courts of that State.

> Smith v Smith, 7 N. D. 404.
> Graham v. Graham, 81 N. W. Rep. 44.

In the latter case the Court says: "It has been held by this Court and is now a well settled rule of statutory construction that the word 'residence' in statutes giving jurisdiction is interpreted to mean the same as 'domicile.'"

Domicile is a question of fact. It must be determined by

proof. There must be a tribunal to decide. What tribunal? It is said no tribunal except that of the domicile. How then and by whom shall the preliminary question be decided? It is said that the status of a person is local to his domicile, hence the Courts of the domicile alone can declare it. Admit it. It is then contended that Mr. Streitwolf was not domiciled in North Dakota; therefore the Court of that State had not power to say that he was. His wife then brings the controversy into the Courts of New Jersey to ascertain the domicile of her husband. But where is derived the power of the New Jersey Courts to determine the question until first it shall have been ascertained that New Jersey is the State wherein he is domiciled? It must be remembered that the question in each State is the domicile of the husband, not of the wife, which is to be decided. The appearance of the opposing party could not confer jurisdiction.

"Consent of parties cannot confer jurisdiction on the Court in relation to a matter excluded by law." (2 Bishop M. & D. Section 151.)

If the case of Thompson v. Whitman is allowed to govern in this respect, and the insistment of Mrs. Streitwolf prevails, we have the anamolous and confusing posture of affairs in which the conclusions of the North Dakota Court are overturned by the Court of another State which has itself in like manner assumed to adjudicate not only the question of domicile, but to pronounce the former adjudication to be null. And where shall this controversy be finally and conclusively ended and authoritatively determined? What Court can be said to possess the jurisdiction.

In the case in hand the uncontroverted testimony is that Mr. Streitwolf abandoned his residence and domicile in New Jersey and acquired one in New York before he finally acquired one in North Dakota. Therefore if he was not a citizen of North Dakota, he would be of New York.

Is then the New Jersey Court competent to decide the question, or shall New York do so?

It is therefore respectfully submitted that the true rule is as before stated, namely, that the *fact* of domicile is not jurisdictional, but the *allegation* of domicile is, and that after such al-

legation made the Court in which it is made becomes clothed with jurisdiction to try the fact as any other fact in issue is tried, and that its conclusion made thereon is final, because made by a tribunal having jurisdiction, and such determination is unimpeachable on collateral attack.

The North Dakota Court therefore had jurisdiction, and possessing that power its conclusion on the merits of the case cannot be opened or retried.

The judgments of the Courts of a Sister State are not re-examinable upon the merits.

Where jurisdiction of the Court depends upon a fact which such Court is required to ascertain and determine from evidence outside of its records, its finding of such fact is conclusive as against a collateral attack, not only in the State where the judgment is rendered, but in every other State.

Works, Courts and their Jurisdiction, page 144.

The ascertainment of this fact is one of the merits of the case.

"The judgments of sister States when authenticated under the Federal Constitution are not merely *prima facie* evidence. Common Law would give them that effect. The Constitution contemplated a power in Congress to give a conclusive effect to such judgments, and such is the rational interpretation of the Act of Congress."

Mills v. Duryee, 7 Cranch, 481.

Judgments rendered in one State of the Union when proved in the Courts of another differ from judgments recovered in a foreign country in no other respect than that of not being re-examinable upon the merits, nor impeachable for fraud in obtaining them, if rendered by a Court having jurisdiction of the case and of the parties.

Hanley v. Donoghue, 116 U. S. 1.
Wisconsin v. Pelican Ins. Co. 127 U. S. 265.
Union Trust Co. v. Southern Inland Nav. & Imp. Co. 130 U. S. 565.

The judgments of the Courts of a Sister State are not impeachable for fraud in obtaining te m.

The grounds upon which the decree in the Court of Chancery of New Jersey was made are thus expressed by the Vice Chancellor in his opinion (R. 124), and this opinion was adopted by the Court of Errors and Appeals as the opinion of the latter Court (R. 147).

The opinion of the Vice Chancellor on this point is in these words:

"If there was a *bona fide* domiciled residence in that State of North Dakota—if Streitwolf went there as any man would go, entirely independent of the question of a desire to get a divorce, if his going there and his adoption of a domicile was thorough and actual—the mere fact that he expected to have the benefit of the laws of the State for a divorce against his wife may not destroy the value of that domicile for present purposes.

"But the fact that he did not go there for that purpose has an effect upon the human mind in determining whether or not, upon all the facts, his residence was *bona fide* so as to establish a domicile or not; and that is the very point in the case."

And then after reviewing the evidence he sums up his conclusion in these words:

"Therefore I hold that the evidence satisfies me that there was no *bona fide* domicile in North Dakota, and that the obtaining of a divorce on the ground of domicile was a fraud on the Court, and entitled the complainant herein to a decree that it shall not constitute a defense to her suit.

"I think this result is clearly within the ruling, not yet reported, of the Court of Errors and Appeals in Magowan v. Magowan, reversing this Court as reported in 39 At. R. 364. There the defendant appeared to the suit."

The New Jersey Courts therefore placed the decision directly upon the ground of fraud in obtaining the judgment.

The Magowan case quoted by the Vice Chancellor has been hereinbefore referred to and an extract made from it.

> In the case of Christmas v. Russell, 5 Wallace, 290, it is said, judgments of the courts of sister States "are open to inquiry as to the jurisdiction of the court and notice to the defendant, but in all other respects they have the same faith and credit as domestic judgments."
>
> In Hilton v. Guyot, U. S. 113, pages 184-185, the effect of a judgment of one State in another is discussed and it is declared that "judgments in another State are not re-examinable on their merits nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties."
>
> See also Kansas City Railroad v. Morgan, 76 Fed. Rep. 429 (435) where this last case is quoted.
>
> Also Thurston v. Thurston (Minn.) 9 N. W. 1017; Kern v. Field (Minn.) 71 N. W. 393.

Divorce being a proceeding in rem, the status determined by decree in rem is binding on the whole world.

It was insisted that the service of the defendant being constructive, the decree would not operate out of the jurisdiction of North Dakota, but it is submitted that taking the most unfavorable view to Mr. Streitwolf, the decree of North Dakota operated upon his status regarding his marital relation. His status was declared by the Court of that State. The status of a thing is inseparably connected therewith. If property located in North Dakota owned by a citizen of New Jersey, had been forfeited or the title thereof changed by a proceeding *in rem* and such property afterward came into the State of New Jersey, the former owner thereof could not claim the title thereto because of the adjudication *in rem*. So in this proceeding, Mr. Streitwolf's status has been determined, and it so remains determined when he enters the State of New Jersey, and if the judgment of the North Dakota Court is protected by the constitutional provision concerning full faith and credit,

and we contend that it is, then it is incompetent for the New Jersey Court to say that Mr. Streitwolf is not a single man. And if the New Jersey Court attempts to divest him of this status, it is not giving that full faith and credit to the foreign decree which it receives in the jurisdiction where rendered.

It will be noted that the decree of the Court of Chancery holds the North Dakota decree *wholly void* and of *no effect*, and enjoins Mr. Streitwolf from relying upon the said decree not only in the suit then pending by his wife against him upon the original bill, but also *in any other suit or proceeding whatsoever at law or in equity.*

All *judicial proceedings* are within the constitutional protection.

In People v. Baker, 76 N. Y. 78-85, Mr. Chief Justice Folger said:

> "It is said that a judicial proceeding to touch the matrimonial relation of a citizen of a State, whether the other party to that relation is or is not also a citizen, is a proceeding in rem, or, as it is more gingerly put, quasi in rem. But it was never heard that the courts of one State can affect in another State the rem there, not subjected to this process, and over the person of the owner of which no jurisdiction has been got. Now, if the matrimonial relation of the one party is the res in one State, is not the matrimonial relation of the other a res in another State? Take the case of a trust, the subject of which is lands in several States, the trustees all living in one State. Doubtless the courts of a State in which the trustees did not live and never went, but in which were some of the trust lands, could proceed in rem and render a judgment without personal service of process, which would determine there the validity of the trust and affect the possession and title of the lands within the jurisdiction of those courts; but it would be contended, that the judgment would operate upon the trustees or upon the lands, in other States, so as to affect the title, or the possession, in those States. It would operate only on the rem, upon which the process of those courts could lay hold. And why is not the matrimonial relation of a citizen of New York as it exists in that State, if it is a res as much exempt from the effect of such a judgment as lands in that State, and the trusts under which they may be held?"

The fallacy in the reasoning in the above case, it seems to me, is the fact that the learned Judge has chosen an immovable subject, namely, "Land," to illustrate his position, but the *res* in divorce being the status of the person, whenever such person passes from one State to another, his status as determined must accompany him.

If we admit that the decree is *in rem* then the judgment must be binding everywhere or else void everywhere.

See in this connection, Bishop on M., D. & S., Vol. 2, Sec. 137 and 153.

Greenleaf on Evidence, Sec. 525.

The status of Mr. Streitwolf has therefore been definitely settled, and the decree of any State Court which adjudges otherwise is in violation of the constitutional provision and the statute passed thereunder, and is a deprivation of a right guaranteed to Mr. Streitwolf thereby.

The declaring *null and void* of this decree is not giving full faith and credit to the constitutional command, for this provision is mandatory, and the slightest invasion or diminution of the right of a suitor claiming the benefit thereof, is a violation, and will constitute error in the Court which denies to any judgment the full force and effect which it has in the jurisdiction where renedered.

It is submitted therefore:

1st. That the North Dakota Court had jurisdiction of the matter of divorce.

2nd. That it had jurisdiction of the plaintiff therein by the filing of his complaint with the allegations therein contained.

3rd. That it obtained jurisdiction of the defendant by the personal service upon her of process in conformity with the laws of said State.

4th. That it duly adjudged that the plaintiff had a *bona fide* domicile in North Dakota.

5th. That the adjudication of such fact is final and cannot be attacked collaterally.

6th. That the judgment being rendered by a Court having jurisdiction of the subject matter and of the *res*, cannot be at-

tacked collaterally for fraud in procuring it, or upon the merits.

7th. That by such adjudication the status of the plaintiff was finally determined and the marriage with the defendant dissolved.

8th. That such adjudication is within the protection of Article IV, Section 1 of the United States Constitution, and of Section 905 of the Revised Statutes of the United States.

9th. That such decree being effectual in North Dakota, to determine the status of the plaintiff with respect to the marriage relation must be accorded the same effect in New Jersey.

10th. That divorce being a proceeding to fix the status of the married person domiciled within the State, is a proceeding *in rem*, and the status thus determined by a decree *in rem* is binding on all the world.

11th. That the New Jersey Court, by reason of the Federal Constitution, is without power to "order, adjudge and decree that the said judgment or decree so as aforesaid entered in said cause in the said District Court of the Sixth Judicial District in and for the County of Morton, and State of North Dakota, is wholly void and of no effect," and that said New Jersey Court is also without power to order, adjudge and decree that August Streitwolf "be and he hereby is perpetually enjoined from setting up against her or in any manner relying upon the said judgment or decree in the suit now pending by the said Elizabeth Streitwolf against him upon the original bill in this cause, or in any other suit or proceeding whatsoever at law or in equity."

The judgment therefore should be reversed.

WILLARD P. VOORHEES,
ROBERT ADRAIN,
Of Counsel with Plaintiff in Error.

Statutes Concerning Substituted Service.

5254. *Service by Publication. Cases and Manner.* Service of the summons in an action may be made on any defendant by publication thereof upon filing a verified complaint therein with the clerk of the district court of the county in which the action is commenced, setting forth a cause of action in favor of the plaintiff and against the defendant, and also filing an affidavit stating the place of defendant's residence, if known to the affiant, and if not known, stating that fact, and further stating:

1. That the defendant is not a resident of this State; or,

2. That the defendant is a foreign corporation, joint stock company or association and has no agent or person in this State upon whom service may be made under the provisions of section 5252; or,

3 That the personal service cannot be made on such defendant within this State to the best knowledge, information and belief and of the person making such affidavit, and in cases arising under this subdivision the affidavit shall be accompanied by the return of the sheriff of the county in which the action is brought, stating that after diligent inquiry for the purpose of serving such summons he is unable to make personal service thereof upon such defendant.

The affidavit shall also state or the complaint show:

1. That the defendant has property within this State or debts owing to him from residents thereof; or,

2. That the defendant is a resident of this State and has departed therefrom with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself secreted therein with a like intent; or,

3. That the relief sought in this action consists wholly or partly in excluding the defendant from any interest in or lien upon specific real or personal property within this State, or in enforcing, regulating, defining or limiting such interest or lien in favor of either party to the action; or otherwise affecting the title to such property; or,

4. That the action is for divorce or for a decree annulling a marriage; or,

5. That the defendant in any of the cases mentioned in the last preceding subdivisions 1, 2, 3 and 4 is unknown to the plaintiff.

5255. *Number of Publications.* Service of the summons by publication may be made by publishing the same six times, once in each week for six successive weeks, in a newspaper published in the county in which the action is pending, if a newspaper is published in such county, and if no newspaper is published in such county, then in a newspaper published at the seat of government of this State.

5256. *Mailing Summons and Complaint.* A copy of the summons and complaint must within ten days after the first publication of the summons be deposited in some post office in this State, postage prepaid, and directed to the defendant to be served at his place of residence, unless the affidavit for publication states that the residence of the defendant is unknown.

5257. *Personal Service Equivalent to Publication.* After the affidavit for publication and the complaint in the action are filed, personal service of the summons and complaint upon the defendant out of the State shall be equivalent to and have the same force and effect as the publication and mailing provided for in this chapter.

5258. *Time When Service Must be Made.* The first publication of the summons or personal service of the summons and complaint upon the defendant out of the State must be made within sixty days after the filing of the affidavit for publication; if not so made, the action shall be deemed discontinued.

5259. *When Service Complete.* Service by publication is complete upon the expiration of thirty-six days after the first publication of the summons, or in case of personal service of the summons and complaint upon the defendant out of the State, upon the expiration of fifteen days after the date of such service.

5260. *When Defendant Permitted to Defend.* The defendant, upon whom service by publication is made or his representatives, on application and a sufficient cause shown at any time before judgment, must be allowed to defend the action;

and except in an action for divorce the defendant, upon whom service by publication is made or his representatives, may, in like manner upon good cause shown, be allowed to defend after judgment, or at any time within one year after notice thereof and within seven years after its rendition on such terms as may be just; and if the defense is successful and the judgment or any part thereof has been collected or otherwise enforced, such restitution may thereupon be compelled as the court directs; but the title to the property sold under such judgment to a purchaser in good faith shall not threby be affected.

5262. *Proof of Service. Acceptance.* Proof of the service of the summons and of the complaint or notice, if any, accompanying the same, must be as follows:

1. If served by the sheriff or other officer, his certificate thereof; or,

2. If by any other person, his affidavit thereof; or,

3. In case of publication an affidavit made as provided in Section 5263 of this code and an affidavit of a deposit of a copy of the summons and complaint in the post office as required by law, if the same shall have been deposited; or,

4. The written admission of the defendant.

In cases of service otherwise than by publication the certificate, affidavit or admission must state the time, place and manner of service.

5264. *Jurisdiction. Appearance.* From the time of the service of the summons in a civil action, or the allowance of a provisional remedy, the court is deemed to have acquired jurisdiction and to have control of all the subsequent proceedings. A voluntary appearance of a defendant is equivalent to personal service of the summons upon him.

Sec. 22. That the printed statute-books and pamphlet session laws of any of the United States, printed and published by the direction or authority of such State, shall be received as evidence of the public laws of such State, in any court of this State; and the court may determine whether any book or pamphlet, offered as such, was so printed or published, either from inspection, or the knowledge of the judge or judges, or from testimony; and no error shall be assigned for the rejection of any book or pamphlet, offered as such, unless it be proved on error that such book or pamphlet, is received as a statute-book or pamphlet containing the session laws of said State, in the courts of such State whose statute-book or pamphlet containing the session laws, it purports to be; nor shall any error assigned for the admission of such book or pamphlet be sustained, unless it be shown in support thereof, that the statute offered in evidence or some material part thereof, was not in force in such State at the time of the transaction or matter to which it was offered as pertinent or material.